

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

Nicholas Schneider,
On behalf of himself and all
others similarly situated,

Plaintiffs,

vs.

Eddie Martini's, Inc.,

Defendant.

Case File No. 08-C-00416

Case Type: Civil

Honorable Magistrate Patricia J. Gorence

DEFENDANT'S MOTION TO DISMISS

NOW COMES the Defendant, Eddie Martini's, Inc., by and through its counsel, Beck, Chaet, Bamberger & Polsky, S.C., and hereby moves this Court, pursuant to FED. R. CIV. P. 12(b)(1), to dismiss the above-captioned action for lack of subject matter jurisdiction. This motion is predicated upon the following grounds:

1. The Plaintiff, Nicholas Schneider ("Schneider"), a former employee of Defendant Eddie Martini's, Inc. ("Eddie Martini's"), filed the above-captioned on May 12, 2008, on behalf of himself and all others similarly situated, alleging that Eddie Martini's had violated the Fair Labor Standards Act and State of Wisconsin minimum wage and overtime laws.

2. In his Complaint, Schneider alleges that, due to the existence of an impermissible tip pool, he was not paid minimum wage and/or overtime as required under the Fair Labor Standards Act ("FLSA") and Wisconsin law, and he seeks back pay, liquidated damages, costs and attorneys fees.

3. By Order dated June 10, 2008, Schneider was given thirty (30) days to amend the Complaint, and Eddie Martini's was given thirty (30) days to respond to the Amended Complaint.

4. On July 10, 2008, Molly A. Tilleson (“Tilleson”), another former employee of Eddie Martini’s, filed a Notice of Consent to join and become a party plaintiff in this action.

5. On July 24, 2008, counsel for Schneider and Tilleson was served with an Offer of Judgment, pursuant to FED. R. CIV. P. 68. The Offer of Judgment included full payment of back minimum wage and/or overtime pay to Schneider and Tilleson, plus costs accrued to date and reasonable attorneys fees, to be determined by the Court. The offer also included liquidated damages in an amount equal to the minimum wage and/or overtime payments.

6. As of the date of this Motion, the Plaintiffs have neither accepted or rejected the Defendant’s Offer of Judgment.

7. Under well established law, once a defendant offers to satisfy the plaintiffs’ entire demand, there is no dispute over which to litigate, and the case is rightfully dismissed under FED. R. CIV. P. 12(b)(1). *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991).

For the foregoing reasons, and as set forth more fully in the Brief and Affidavits submitted herewith, the Defendant, Eddie Martini’s, requests that this Court grant its Motion to Dismiss the above-captioned action for lack of subject matter jurisdiction.

BECK, CHAET, BAMBERGER & POLSKY, S.C.

Dated: July 31st, 2008

By: /s/ Barry L. Chaet
Barry L. Chaet, Esq.
State Bar No. 1001405
Katherine L. Williams
State Bar No. 1018443
Two Plaza East, Suite 1085
330 East Kilbourn Avenue
Milwaukee, WI 53202
(414) 273-4200

Attorneys for Eddie Martini’s, Inc.